Filed 3/3/09 Hance v. Smith CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DANNY G. HANCE, Cross-complainant and Respondent, v. GREGORY SMITH, Cross-defendant and Appellant.	D051917 (Super. Ct. No. GIC847788)

APPEAL from an order of the Superior Court of San Diego County, William R. Nevitt, Jr., Judge. Affirmed.

Appellant Gregory Smith appeals from an order denying his motion to dissolve a civil injunction against harassment (Code Civ. Proc., § 527.6). Smith's claims on appeal rest on the assertion that because there is an unfinished contractual arbitration between the parties, the superior court (and this court as well) had no authority to act. Specifically, he contends (1) the superior court judge who set the case for trial and issued the injunction was without jurisdiction to issue orders in the case pending the outcome of

arbitration; (2) Hance had no standing to seek judicial relief; and (3) any trial or appellate court involvement in the case, including on his motion to dissolve the injunction, is limited to reviewing the arbitration award. Hance seeks sanctions and an award of attorney fees and costs. We affirm the order and, though we deny Hance's request for sanctions, conclude he is entitled to attorney fees and costs as explained below.

FACTUAL AND PROCEDURAL BACKGROUND

This is the second appeal in this matter. In May 2007, we upheld a three-year restraining order issued in favor of respondent Danny Hance and his family and against appellant and his brother Steven Smith (collectively the Smiths, separately for clarity Gregory and Steven), barring the Smiths from harassing, attacking, striking, threatening, assaulting, hitting, following or stalking the Hances, and also barring them from photographing or videotaping the Hances' home and driveway, garage, yard and vehicles parked in front of their home. (*Smith v. Hance* (May 4, 2007, D047471) [nonpub. opn.].) The restraining order was filed on September 19, 2005. We incorporate by reference the facts from our prior opinion without repeating them here.

In August 2007, Gregory moved to dissolve the injunction on grounds there had been a change in the controlling facts on which the injunction rested, namely, that the San Diego Neighborhood Code Compliance Department (the Department) had reopened a case against the Hances in February 2007, rendering "legitimate" the Smiths' formerly complained of conduct by which they assertedly sought to document the Hances' alleged commercial business operation in a residential neighborhood. He further argued that because the Hances moved their business, there was "nothing upon which the injunction

can operate." Hance opposed the motion on grounds Gregory had a few months earlier made a virtually identical motion that had been denied,[1] and there had been no material change in the facts justifying dissolution. In particular, Hance pointed out Gregory offered no proof that the Department had reopened its case and argued that in any event, "[i]f Smith continues to complain to the City, and the City is thereby required to investigate, it doesn't make his conduct legitimate; it only confirms how relentless Mr. Smith has become over the past four years in the harassment of the Hance family."

On the day set for arguments on the matter, Gregory filed amended points and authorities to assert that the Department had reopened its case in February *2005* and that the case was "currently open." He challenged the superior court's and this court's findings and conclusions as to the basis for the civil injunction, arguing there was "never a basis" (bold omitted) for the injunction because Steven had filed a request for investigation on February 22, 2005, which "according to San Diego City Council Policy . . . reopened the case." At the parties' agreement, the court recessed the hearing to permit Hance to review the amended papers.

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1 On appeal, Hance asserts that Gregory first filed a motion to dissolve the injunction before San Diego Superior Court Judge Raphael Arreola, which Judge Arreola denied in June 2007. That motion and ruling, however, are not in the record before us. After filing the motion at issue in this case, Gregory successfully challenged Judge Arreola under Code of Civil Procedure section 170.6, causing the case to be reassigned to the judge whose order is the subject of this appeal. Whether or not Gregory made multiple attempts to obtain a favorable ruling on his motion does not impact the outcome of our decision.

In oral argument, Gregory sought to explain that the February 2005 complaint "trigger[ed]" an opening of the case; he reasoned that if the case were open as of February 2005 his and his brother's actions were "by definition" legitimate under the trial court's and this court's standards. Following arguments, the trial court denied Gregory's motion on grounds he had not demonstrated a sufficient showing under Code of Civil Procedure section 533. Gregory appeals from that October 2, 2007 order.

DISCUSSION

I. *Gregory's Contentions Regarding Jurisdiction*

Conceding he is raising the issue for the first time on appeal and extending his challenges beyond the trial court's October 2, 2007 order, Gregory contends the superior court lacked jurisdiction to "enter the orders it did," including setting the case for trial and entering the injunction upheld in this court's prior opinion, because "the matter and parties were actually in an arbitration proceeding." He relies on the proposition that questions of jurisdiction are never waived and may be raised for the first time on appeal and may be shown by extrinsic evidence, and he asks us to vacate all of the trial court's orders, recall our remittitur issued in the earlier appeal, vacate the order denying dissolution of the injunction, and direct the trial court to return the parties to arbitration. Gregory maintains the issue presents a pure question of law based on undisputed facts, allowing us to exercise our independent judgment on the matter.

In response, Hance points out Gregory never raised these issues in the superior court and his assertions as to the status of arbitration are false; Hance argues the only

issue at hand is whether or not the trial court had grounds to dissolve the injunction. Hance also argues the issues are moot because the injunction has now expired.

A. *This Court Lacks Jurisdiction To Review Any Judgment or Order Other Than the October 2, 2007 Order Denying Gregory's Motion to Dissolve the Injunction*

We agree as a threshold matter that the only issue before us is the propriety of the court's October 2, 2007 order. Gregory's notice of appeal unambiguously identifies only the trial court's October 2, 2007 order as the order from which he appeals. While California Rules of Court, rule 8.100(a)(2) provides that "[t]he notice of appeal must be liberally construed," the rule of liberal construction does not permit appellate review of an unspecified order or judgment "where the notice of appeal *unambiguously* evidences an intent to appeal from . . . one of several separate appealable orders or judgments." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 3:130.5, pp. 3-56 (rev. #1 2008); accord, *Sole Energy Co. v. Petrominerals Corp*. (2005) 128 Cal.App.4th 212, 239; *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1284, disapproved on another point in *San Diego Watercraft, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315; *DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43; *Unilogic, Inc. v. Burroughs Corp*. (1992) 10 Cal.App.4th 612, 624-625; *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 47; 9 Witkin, Cal. Procedure (5th ed. 2008), Appeal, § 561, p. 640.) We cannot construe Gregory's notice of appeal as applying to any other order or judgment. Because we are without appellate jurisdiction to review any judgment or order other than the October 2, 2007 order, we

disregard Gregory's challenges to the extent they are directed at the trial court's orders setting the case for trial or entering the injunction.

B. *Gregory Cannot Raise His Jurisdictional Argument for the First Time on Appeal*

Gregory argues that once a matter is submitted to arbitration, the trial court is divested of jurisdiction and becomes *functus officio* – of no further authority – and is "statutorily barred, pending the outcome of contractual arbitration, to proceed with a trial of the matter." In related arguments, Gregory argues broadly the trial court lacked jurisdiction to hear the matters before it and Hance had no standing to seek judicial relief because he did not exhaust his administrative arbitration remedies. Under the principles set out above, we limit our analysis to Judge Nevitt's October 2, 2007 order. Doing so, we reject Gregory's arguments as forfeited.[2]

Gregory himself acknowledges that he seeks to challenge not the trial court's subject matter jurisdiction, but its power to act under a prescribed statutory procedure: "It is Smith's argument that the trial courts lacked 'jurisdiction' in that the trial courts were deprived of the statutory power or authority to make certain orders, not that the courts lacked fundamental jurisdiction." Indeed, Gregory argues the trial court "was invested with fundamental jurisdiction over the subject matter of the arbitration, and over the parties who signed the arbitration agreement, and of personal jurisdiction over Gregory, but, was without statutory power . . . ." Citing *Abelleira v. District Court of Appeal*

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[2] In considering these arguments, we express no opinion on the truth or falsity of Gregory's assertions as to the status of any arbitration between the parties. We reach the same result even assuming arguendo his assertions are true.

(1941) 17 Cal.2d 280, 293 (*Abelleira*), Gregory also argues Hance should not have been granted relief because he improperly bypassed the arbitration system.

Under these circumstances, Gregory has forfeited his jurisdictional arguments by failing to raise them below. This is not an issue of fundamental jurisdiction that may be raised for the first time on appeal. (*People v. Mower* (2002) 28 Cal.4th 457, 474, fn. 6 ["Issues relating to jurisdiction in its fundamental sense . . . may be raised at any time"].) "By contrast, issues relating to jurisdiction in its less fundamental sense may be subject to bars including waiver . . . ." (*Ibid.*) As Gregory acknowledges, a trial court's disregard of a statutory limitation does not raise an issue of subject matter or personal jurisdiction. Rather, the type of jurisdictional error implicated is action by the court that is in "excess of jurisdiction," a separate and distinct concept from subject matter or personal jurisdiction. (See *Harnedy v. Whitty* (2003) 110 Cal.App.4th 1333, 1334; accord *People v. Mower*, *supra*, 28 Cal.4th at p. 474, fn. 6; *Abelleira*, *supra*, 17 Cal.2d at p. 288; *Wozniak v. Lucutz* (2002) 102 Cal.App.4th 1031, 1040 [acts that exceed the defined power of the court in any instance whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are described as acts in excess of jurisdiction], disapproved on other grounds in *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1104.)

The principle applies to Gregory's arguments invoking the exhaustion doctrine. "While the Supreme Court in *Abelleira* . . . 'declared the exhaustion of administrative remedies to be jurisdictional' [citation] . . . '[t]his does not mean . . . a party may raise the issue for the first time on appeal.' [Citation.] This is because the *Abelleira* court 'did not

hold that the exhaustion doctrine implicated a court's subject matter jurisdiction . . . .' [Citation.] Rather, the doctrine is ' "a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of *stare decisis*, and binding upon all courts." ' " (*People ex rel. DuFauchard v. U.S. Financial Management, Inc.* (2009) 169 Cal.App.4th 1502, 1513, quoting *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 133-135.) The forfeiture doctrine thus applies to a claim that a party has not exhausted administrative remedies if it is not raised in the trial court. (*DuFauchard*, at p. 1513; *Mokler*, at p. 134; see also *O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 583-584.)

" '[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.' Thus, 'we ignore arguments, authority, and facts not presented and litigated in the trial court. Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived.' " (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11, fns. omitted.) "Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider. [Citation.] In our adversarial system, each party has the obligation to raise any issue or infirmity that might subject the ensuing judgment to attack. [Citation.] Bait and switch on appeal not only subjects the parties to avoidable expense, but also wreaks havoc on a judicial system too burdened to retry cases on theories that could have been raised earlier." (*JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178.)

Because Hance was denied any opportunity to address the jurisdictional arguments now made by Gregory, we decline to hear them on this appeal. The jurisdictional challenge was forfeited. In reaching our conclusion, we are mindful that Gregory represents himself on appeal. However, his status as a party appearing in propria persona does not provide a basis for preferential consideration. "A party proceeding in propria persona 'is to be treated like any other party and is entitled to the same, but no greater[,] consideration than other litigants and attorneys.' [Citation.] Indeed, ' "the in propria persona litigant is held to the same restrictive rules of procedure as an attorney." ' " (*First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 958, fn. 1.)

C. *Mootness*

Finally, we agree that under settled principles, Gregory's appeal is now moot. An appeal becomes moot when, through no fault of the respondent, the occurrence of an event renders it impossible for the appellate court to grant the appellant effective relief. (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541; *In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1315-1316.) "[T]he duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment,

but will dismiss the appeal." (*Consol. etc. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 863.)

"Notwithstanding [the mootness doctrine], there are three discretionary exceptions to the rules regarding mootness: (1) when the case presents an issue of broad public interest that is likely to recur [citation]; (2) when there may be a recurrence of the controversy between the parties [citation]; and (3) when a material question remains for the court's determination." (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479-480; see also *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 746-747.) In such cases, a reviewing court may exercise its inherent discretion to resolve an issue rendered moot. (*Balayut v. Superior Court* (1996) 12 Cal.4th 826, 829, fn. 4.)

None of these exceptions apply here. The September 19, 2005 restraining order expired by its terms on September 9, 2008. As a result, Gregory has essentially received the relief he requested below. Any issue that Gregory may properly raise in this appeal is now moot.

II. *Hance's Request for Sanctions, Costs and Attorney Fees*

Hance asks us to sanction Gregory to "discourage him from continuing to use the judicial system as a means to harass the Hance family" and for an award of costs and

attorney fees in defending the trial court's issuance of the injunction under the parties' July 2002 memorandum of understanding (MOU).[3]

Absent the requisite motion with supporting documentation (California Rules of Court, Rule 8.276(b)), we deny Hance's request for sanctions. As for attorney fees, Hance asserts that although he can no longer afford to have his attorney appear, his attorney has been assisting him with these matters and that the MOU mandates payment of attorney fees to the prevailing party. We agree that to the extent he can demonstrate he retained counsel who rendered services assisting in defending Gregory's motion to dissolve the injunction (which in turn sought to enforce the MOU), Hance is entitled to recover his reasonable attorney fees. (Civ. Code, § 1717; *West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 706-707; *Mix v. Tumanjan Development Corp*. (2002) 102 Cal.App.4th 1318, 1321, 1324-1325 [successful pro per litigant can recover attorney fees under Civil Code section 1717 for legal services of assisting counsel even though counsel did not appear as attorneys of record].) Because Civil Code section 1717 does not provide otherwise, he is also entitled to attorney fees on appeal. (*Wanland v. Law Offices of Mastagni, Holstedt and Chiurazzi* (2006) 141 Cal.App.4th 15, 21; *Evans v.*

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3 As we observed in our prior opinion (*Smith v. Hance*, *supra*, D047471, pp. 32, 33, fn. 16), the parties' MOU stated in part that "[a]ll parties shall comply with all state and local law, codes and ordinances." Paragraph 5 of the MOU provides: "Any alleged future violation of this MOU or the Settlement Agreement shall be resolved by a JAMS arbitrator who shall have the jurisdiction to determine the existence or non-existence of the alleged violation, and discretion to award damages. The prevailing party shall be entitled to recovery of his or her reasonable attorney fees and costs."

Unkow (1995) 38 Cal.App.4th 1490, 1499.) We leave it to the trial court to determine such fees. (*Security Pacific National Bank v. Adamo* (1983) 142 Cal.App.3d 492, 498.)

DISPOSITION

The order is affirmed and the matter remanded to the trial court for a determination of the proper amount of attorney fees in accordance with this opinion. In addition to attorney fees, Hance shall recover costs on appeal.

O'ROURKE, J.

WE CONCUR:

HALLER, Acting P.J.

McDONALD, J.